

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

THOMAS THATCHER SCHEMKES, BRIAN)
MCKENNA, JAMES HAMMOND, AND)
GREGORY GREEN, INDIVIDUALLY AND ON)
BEHALF OF OTHERS SIMILARLY SITUATED,) Case No.: 2:09-cv-1100-GMN-PAL

Plaintiffs,

vs.

ORDER

PRESIDENTIAL LIMOUSINE, A NEVADA)
COMPANY; CLS NEVADA, LLC; A)
DELAWARE CORPORATION, DOING)
BUSINESS AS CLS TRANSPORTATION, LAS)
VEGAS; AND JACOB TRANSPORTATION)
SERVICES, LLC, A NEVADA COMPANY,)
DOING BUSINESS AS EXECUTIVE LAS)
VEGAS,)

Defendants.

AND RELATED COUNTER PARTIES.

Before the Court is Defendant/Counterclaimant Jacob Transportation Services, LLC's Motion to Dismiss Plaintiffs' case pursuant to Rule 37 or for Summary Judgment (ECF No. 128). Defendant CLS Nevada, LLC filed a Joinder to Jacob Transportation's motion (ECF No. 134). Plaintiffs/Counterdefendants filed a Response on July 2, 2010 (ECF No. 137) and Jacob Transportation filed a Reply on August 9, 2010 (ECF No. 149).

FACTS AND BACKGROUND

Plaintiff/Counterdefendant, Thomas Thatcher Schemkes ("Schemkes"), brought this action against three limousine companies he had previously worked for in Las Vegas: Presidential Limousine ("Presidential"), CLS Transportation ("CLS") and Jacob Transportation Services ("Jacob Transportation"). Plaintiff was employed as a limousine

1 driver for Defendants as follows: (1) Presidential from February to July of 2007; (2) CLS
2 from August of 2007 to June of 2008; and (3) Jacob Transportation from October of 2008, to
3 the time when this action was filed. Schemkes accuses Defendants of failing to pay
4 minimum wage and overtime compensation in violation of the Fair Labor Standards Act, 29
5 U.S.C. §§ 201 et seq. (“FLSA”).

6 Plaintiff filed his complaint on June 18, 2009 as a proposed FLSA collective action on
7 behalf of other similarly situation persons who were employed as limousine drivers by
8 Defendants. When Jacob Transportation filed its Answer, it asserted state law counterclaims
9 against Plaintiff for breach of contract, breach of the implied covenant of good faith and fair
10 dealing, unjust enrichment, intentional and negligent misrepresentation, trespass to
11 land/conversion, and abuse of process. The Court dismissed the counterclaim for abuse of
12 process but the remaining claims remain. (Order, ECF No. 105).

13 Schemkes filed a motion to amend and add additional parties, factual allegations and a
14 legal claim for violation of FLSA and U.S. Department of Labor regulations for improper
15 deductions from wages. (Motion to Amend, ECF No. 46). The Court granted Schemkes’
16 motion and allowed Brian McKenna, James Hammond, and Gregory Greene to be added as
17 Plaintiffs to the action. (Order, ECF No. 105). Plaintiff Brian McKenna (“McKenna”) was
18 employed as a limousine driver by Presidential from on or about January 2007 to May 2008.
19 Plaintiff James Hammond (“Hammond”) was employed as a limousine driver by CLS from
20 on or about May 1997 to March 2008. Plaintiff Gregory Greene (“Greene”) was employed
21 as a limousine driver by Jacob Transportation from on or about August 2007 to January
22 2009. (Motion to Amend, ECF No. 46).

23 Plaintiffs claim they were paid on a commission based system. (*See* Amended
24 Complaint, Ex. 1, ECF No. 46). Plaintiffs had a regularly scheduled shift each day and a
25 fixed number of hours per shift. (*Id.*) They were required to be on-duty the entire scheduled

1 shift which was usually between eight to twelve hours. (*Id.*) Defendants paid Plaintiffs a
2 fixed dollar amount per trip. Plaintiffs would also receive tips from customers. (*Id.*)
3 Sometimes, Plaintiffs would have slow days in which they averaged very few trips. (*Id.*)
4 Plaintiffs allege that in some circumstances this would mean that Plaintiffs did not earn
5 enough money in a week to meet the minimum hourly wage as mandated by the FLSA. (*See*
6 29 U.S.C. § 206).

7 Defendant/Counterclaimant Jacob Transportation alleges that Plaintiff/Counter-
8 defendant Schemkes intentionally converted commissions or fares, intentionally inflated his
9 work hours, and intentionally concealed monies and tips, giving rise to various claims for
10 relief. (*See* Jacob Counterclaim, ECF No. 119). The facts alleged regarding Schemkes'
11 conduct support Jacob Transportation's counterclaims as well as their affirmative defenses.
12 Furthermore, the facts supporting these allegations are pertinent in determining both parties'
13 damages. Schemkes refused to answer certain questions concerning actual amounts he
14 earned while working for Jacob Transportation at his deposition. (*See, e.g.*, Schemkes' Dep.
15 pg. 308–09, ECF No. 128). Plaintiff and his counsel asserted the Fifth Amendment defense
16 at his deposition and also relies on the defense in responding to the Counterclaim,
17 specifically responses to paragraphs 70, 85, 86, 90, 93, 94, 114-16, 119, and 120. (*See*
18 Answer, ECF No. 127). Jacob Transportation filed the instant motion based on Schemkes'
19 failure to participate in discovery that is material to the case. CLS joined in Jacob
20 Transportation's motion.

21 **DISCUSSION**

22 **A. Legal Standard**

23 Federal Rule of Civil Procedure Rule 37 allows a court to issue sanctions if a party
24 fails to obey a court order regarding discovery. Fed. R. Civ. P. 37(b). These sanctions
25 include: striking pleadings in whole or in part; dismissing the action or proceeding in whole

1 or in part; or rendering a default judgment against the disobedient party. *Id.*

2 Rule 26 provides that the scope of discovery includes “any nonprivileged matter that
3 is relevant to any party’s claim or defense.” Fed. R. Civ. P. 26(b). “What is privileged is
4 defined by the Federal Rules of Evidence; these rules include the privilege against self-
5 incrimination.” *Campbell v. Gerrans*, 592 F.2d 1054, 1057 (9th Cir. 1979); *See Hickman v.*
6 *Taylor*, 329 U.S. 495, 507-508, 67 S.Ct. 385, 392 (1947). The Fifth Amendment protection
7 of an individual’s right against self-incrimination “applies alike to civil and criminal
8 proceedings, wherever the answer might tend to subject to criminal responsibility him who
9 gives it.” *McCarthy v. Arndstein*, 266 U.S. 34, 40, 45 S.Ct. 16, 17 (1924). “The principle of
10 Fifth Amendment protection has been construed to permit the privilege to be asserted ‘in any
11 proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory.’”
12 *Campbell* at 1057 (quoting *Kastigar v. United States*, 406 U.S. 441, 444, 92 S.Ct. 1653, 1656
13 (1972)). As the *Campbell* court explains, lower courts have repeatedly held that the privilege
14 against self-incrimination justified a person in refusing to respond to interrogatories. *See id.*
15 However there is some authority that the imposition of sanctions, including dismissal of an
16 action, is proper upon a Plaintiff who asserts the Fifth Amendment in a civil suit. *See id.*

17 For example, in *Lyons v. Johnson*, 415 F.2d 540 (9th Cir. 1969) the court dismissed
18 plaintiff’s case where plaintiff refused to participate in discovery by invoking the Fifth
19 Amendment privilege against self incrimination. In explaining why a plaintiff cannot use the
20 privilege as both a sword and shield, the court stated:

21 Clearly, the process of discovery has become increasingly
22 recognized as one of the primary and essential elements in
23 making federal court business flow and in contributing to the
24 accomplishing of trial justice or settlement termination of
25 litigation. The scales of justice would hardly remain equal in
these respects, if a party can assert a claim against another and
then be able to block all discovery attempts against him by
asserting a Fifth Amendment privilege to any interrogation
whatsoever upon his claim. If any prejudice is to come from such

1 a situation, it must, as a matter of basic fairness in the purposes
2 and concepts on which the right of litigation rests, be to the party
3 asserting the claim and not to the one who has been subjected to
its assertion. It is the former who has made the election to create
an imbalance in the pans of the scales.

4 *Id.* at 542. The plaintiff in *Lyons* would not participate in any depositions or
5 discovery whatsoever in relation to the claims. *Id.* at 541. The trial court also explained to
6 the plaintiff that her case would be dismissed if she continued to invoke shield of self-
7 incrimination before it would dismiss her case. *Id.* Once she continued in her protest, the
8 trial court had no other choice but to dismiss the case. The court of appeals upheld the trial
9 court's dismissal. *Id.* at 542.

10 The holding in *Lyons* was distinguished by *Campbell*, 592 F.2d 1054. In *Campbell*
11 the court of appeals found that the trial court's dismissal of the case for plaintiff's refusal to
12 answer four interrogatories was an abuse of discretion. The court also found that the four
13 unanswered interrogatories were of a highly questionable nature and appear on their face to
14 raise Fifth Amendment problems. *Id.* at 1057. The court in that case explained that while
15 discovery rules are to be accorded a broad and liberal treatment they do have their ultimate
16 and necessary boundaries. *Id.* One of those boundaries is the Fifth Amendment protection
17 against self incrimination. *Id.*

18 **B. Discussion**

19 The instant suit presents a question that lies in between the facts of *Lyons* and
20 *Campbell*. During his deposition, Schemkes refused to answer any questions regarding
21 commissions he earned, rides that he allegedly chose not to report, the amount of tips he
22 made in cash as well as tips earned for taking passengers to gentlemen's clubs and nightclubs
23 while employed for Defendants. Jacob Transportation argues that Schemkes is using the
24 Fifth Amendment privilege as a sword and a shield. Jacob Transportation explains that
25 Schemkes should not be allowed to file claims that he did not earn the minimum wage but

1 then refuse to answer questions regarding his ‘full’ compensation, which is essential to both
2 Jacob Transportation’s counterclaims and defense. Jacob Transportation argues that it is the
3 same reasoning that precludes a litigant from claiming the privilege against self-
4 incrimination on cross-examination after he has testified fully on direct examination. *See*
5 *Brown v. United States*, 356 U.S. 148, 154 (1958). “[The litigant] has no right to set forth to
6 the jury all the facts which tend in his favor without laying himself open to a cross-
7 examination upon those facts.”

8 Jacob Transportation argues that the true amount of commissions earned including
9 tips is crucial to its defense. It explains that it has records for rides that were paid with credit
10 cards but any rides that were paid in cash required the driver to report it as an honor system.
11 An employee was required to report the commission and pay Jacob Transportation its share
12 for any cash rides. Jacob Transportation alleges that Schemkes routinely took cash as
13 payment and then failed to report these trips to his employers. Therefore, if Schemkes
14 refuses to answer questions regarding what he actually made, then there is no way to
15 calculate his wage properly. Jacob Transportation argues that Schemkes cannot claim that
16 his commissions failed to equal the minimum wage and then refuse to answer questions as to
17 whether he concealed the actual and true amount of his commissions. This would be using
18 the Fifth Amendment as both a sword and a shield.

19 Jacob Transportation also argues that Schemkes’ actual amount of tips earned is
20 relevant to its defense regarding tip credit. An employer is allowed to pay an employee less
21 than the mandated minimum wage if the employee makes more than \$30 a month in tips and
22 the amount of tips plus the employee’s wage then equals the minimum hourly wage. 29
23 U.S.C. § 203(m), (t). Therefore, Jacob Transportation would need to know the actual
24 amount of tips received in order to defend itself against Schemkes’ charge that he was not
25 paid the minimum wage. Jacob Transportation argues that because Schemkes will not

1 participate in discovery with regard to material facts needed to defend itself this case should
2 be dismissed as was the action in *Lyons*.

3 Schemkes argues that he is entitled to invoke the Fifth Amendment privilege against
4 self-incrimination because the Defendants have made repeated allegations that he, and other
5 plaintiffs, did not report all of his fares and tips to his employers and the IRS. The
6 allegations amount to theft and failure to pay taxes, both serious crimes. Schemkes argues
7 that this case is more closely related to the *Campbell* case, where the plaintiff only refused to
8 answer 4 out of 34 interrogatories and the court refused to dismiss that case. Instead,
9 Schemkes acknowledges that while his case is not subject to dismissal it is subject to a
10 negative inference for lack of proof and that he may be precluded from rebutting Defendants'
11 evidence on the issue. *See e.g., Campbell* 592 F.2d at 1058 (affirming that negative
12 inference can be drawn from silence in civil cases).

13 Schemkes further argues that *Campbell* makes it clear that a court can only impose the
14 Rule 37 sanction of dismissal if a party refuses to completely participate in discovery or does
15 not obey a court order. Schemkes has participated in discovery and there have not been any
16 court orders to compel Schemkes to participate more fully in discovery. The court agrees
17 that dismissal would not be proper in this case without at least a warning to Schemkes that
18 his continued invocation of the Fifth Amendment with regard to material issues would result
19 in dismissal.

20 However, the Court is also cognizant of the distinguishing features of this case as
21 compared to the *Campbell* case. The four interrogatories that were allowed to go
22 unanswered in *Campbell* were of a highly questionable nature that appeared on their face to
23 raise Fifth Amendment problems. *Campbell*, 592 F.2d at 1057. Here, the actual amount
24 Schemkes earned is very relevant to the minimum wage claims asserted against Jacob
25 Transportation. The parties cannot factually account for the amount the drivers were paid if

1 commissions on unreported rides were concealed. The same is true for any questions
2 regarding tips. The questions are not so questionable on their face but instead go directly to
3 the matter being litigated. Although these questions could lead to charges of theft and
4 criminal withholding of taxes, the Fifth Amendment is not an invitation to mutilate the truth.

5 Nevertheless, the Ninth Circuit provides relatively broad Fifth Amendment
6 protection. “Imposing the harshest of the Rule 37 sanctions on a proper exercise of Fifth
7 Amendment rights is not in accord with Supreme Court decisions.” *Campbell*, 592 F.2d at
8 1057. “[T]he privilege protects the right of a person to remain silent unless he chooses to
9 speak in the unfettered exercise of his own will, and that he is to suffer no penalty for his
10 silence.” *Id.* (citing *Spevack v. Klein*, 385 U.S. 511, 515, 87 S.Ct. 625, 628 (1967), which
11 states: “In this context ‘penalty’ is not restricted to fine or imprisonment. It means, as we
12 said in *Griffin v. California*, 380 U.S. 609, 85 S.Ct. 1229 (1965), the imposition of any
13 sanction which makes assertion of the Fifth Amendment privilege ‘costly’.”).

14 However tempting it is for this Court to grant Counterclaimant/Defendant’s Motion,
15 an automatic dismissal of the action would be a costly penalty not likely to survive the
16 *Griffin* test. As explained in *Campbell*, dismissal is proper if a party acts in willful and
17 deliberate disregard of court orders. Schemkes has not yet done that in this case. He has
18 participated in discovery and exercised his right to invoke the protection of the Fifth
19 Amendment only for questions he fears will result in criminal prosecution.

20 However, a district court still has discretion in its response to a party's invocation of
21 the Fifth Amendment. *Nationwide Life Ins. Co. v. Richards*, 541 F.3d 903, 910 (9th Cir.
22 2008); see *Wehling v. Columbia Broadcasting System*, 608 F.2d 1084, 1089 (5th Cir.1979)
23 (If invocation of privilege prejudiced the other party, the district court “would be free to
24 fashion whatever remedy is required to prevent unfairness.”). Thus, if Schemkes insists on
25 invoking the Fifth Amendment privilege to the material issues in this case, using the

1 privilege as not merely a shield but also a sword, the Court will allow an adverse inference at
2 trial based on Plaintiff/Counterdefendant's silence and not allow Schemkes to rebut any
3 evidence presented by Defendants/Counterclaimants on the subject. *See Campbell*, 592 F.2d
4 at 1058; *Nationwide Life Ins. Co.*, 541 F.3d at 910. However, the adverse inference will not
5 relieve Jacob Transportation of the burden to prove its claim; there must be some evidence,
6 even if circumstantial, to support it as is more fully discussed below.

7 **C. Summary Judgment**

8 Jacob Transportation further asserts that since Schemkes responded to the
9 counterclaims by invoking the Fifth Amendment these allegations are deemed admitted.
10 Rule 8(b)(1)(B) states: "In responding to a pleading, a party must admit or deny the
11 allegations asserted against it by an opposing party." Rule 8(b)(2)-(5) lists the types of
12 denials, or partial denials, that are permitted, including denials based on lack of information
13 or knowledge. The list does not include denial based on the Fifth Amendment. Although
14 not directly binding on this court, another district court in the Ninth Circuit has addressed the
15 issue as to whether a party's invocation of the Fifth Amendment in response to a complaint
16 should be deemed an admission. In *Industrial Indem. Co. v. Niebling*, the court held that "a
17 court should not deem assertion of the Fifth Amendment privilege to be an admission of the
18 allegations in the complaint." 844 F.Supp. 1374 (D.Ariz. 1994).

19 Likewise, many other cases suggest that as long as the privilege is properly raised, a
20 court should not deem assertion of the Fifth Amendment privilege to be an admission of the
21 allegations in a complaint. *See de Antonio v. Solomon*, 42 F.R.D. 320, 322 (D.Mass.1967);
22 *North River Ins. Co., Inc. v. Stefanou*, 831 F.2d 484, 486 (4th Cir.1987); *National*
23 *Acceptance Co. of America v. Bathalter*, 705 F.2d 924, 926 (7th Cir.1983); *Rogers v.*
24 *Webster*, 776 F.2d 607, 611 (6th Cir.1985). Therefore, if the party invoking the privilege
25 provides a foundation for the assertion of the privilege so that the district court can determine

1 whether the privilege may be invoked then it will not be deemed an admission. *See Industrial*
2 *Indem. Co.*, 844 F.Supp at 1377; *Rogers*, 776 at 611; *In re Morganroth*, 718 F.2d 161 (6th
3 Cir. 1983).

4 For example, in *Baker v. Limber*, the Ninth Circuit emphasized that a mere reference
5 to pending criminal proceedings is not sufficient. 647 F.2d 912, 917 (9th Cir. 1981). The
6 party asserting the privilege must demonstrate a “nexus” between the risk of criminal
7 conviction and the information requested. In *Baker*, although the defendant explained in a
8 motion that he had been convicted in state court, he did not describe the subject matter of the
9 state indictment and did not demonstrate its connection to the requested discovery. Further,
10 the risk of conviction was not evident from the implications of the questions and the
11 defendant supplied no basis for his belief that the answers would incriminate him. *Id.*

12 In this case, it appears that Schemkes asserted his Fifth Amendment privilege to
13 several claims set forth in Jacob Transportation’s Counterclaim without providing a basis for
14 asserting the Fifth Amendment Privilege. (*See Answer to Counterclaim*, ECF No. 127).
15 However, later in response to Jacob Transportation’s motion to dismiss, Schemkes does give
16 a reason for asserting the privilege. Schemkes explains that the reason he is invoking the
17 Fifth Amendment is to avoid criminal prosecution for improperly reporting his wages to the
18 IRS and any charges of theft arising from his alleged activities while employed by the
19 Defendants. Schemkes does not claim that there are any pending criminal charges against
20 him or even that charges are impending, only a mere possibility. However, Jacob
21 Transportation does assert a counterclaim against Schemkes and Greene for trespass to
22 chattels and conversion, charging that each provided rides to customers and kept the entire
23 fare for themselves instead of the 25% commission agreed upon in the employment contract.

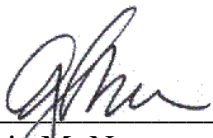
24 Based on the foregoing the court finds that Schemkes has established a nexus between
25 this case and the danger of incrimination such that the court will not deem Schemkes’

1 answer's to Jacob Transportation's counterclaims admissions. Admitting any sort of
2 wrongdoing when reporting one's income to the IRS could subject the person to a
3 cumbersome audit and in turn lead to criminal prosecution. This fear of prosecution is a
4 significant nexus to the current civil litigation regarding Schemkes' wages. Therefore, the
5 Court will not deem the answers admitted and will not order default judgment against
6 Schemkes at this time.

7 **CONCLUSION**

8 IT IS HEREBY ORDERED that Defendants' Motion to Dismiss/Summary Judgment
9 is DENIED. However, if the Fifth Amendment invocation is continued, an adverse inference
10 will be allowed at trial.

11 DATED this 18th day of February, 2011.

12 
13 _____
14 Gloria M. Navarro
15 United States District Judge
16
17
18
19
20
21
22
23
24
25